

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHELLE LEE DEWYSE,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 242137

Saginaw Circuit Court

LC No. 01-019889-FH

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree child abuse, MCL 750.136b(3), and was sentenced to one year in jail. This case arises from injuries inflicted on defendant's eight-month-old son by her boyfriend while defendant was present in the home. Defendant now appeals and we affirm.

Defendant first claims she received ineffective assistance of counsel because her attorney did not investigate or present available psychiatric evidence indicating that defendant had a diminished ability to perceive events and therefore was unaware that her boyfriend was abusing her son. Defendant also claims ineffective assistance of counsel because counsel did not present psychiatric evidence to rebut the prosecutor's contention that she was aware the abuse was occurring. We disagree.

Appellate review of an ineffective assistance of counsel claim involves a mixed question of fact and constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error, and constitutional questions de novo. *Id.* at 579. However, because this issue was not preserved by a motion for new trial or an evidentiary hearing, appellate review is limited to "mistakes apparent on the record." *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, a defendant must show counsel's performance fell below an objective standard of reasonableness, and defendant was denied a fair trial from the resulting prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

While a decision whether to present evidence is generally considered trial strategy, *People v Rockett*, 237 Mich App 74, 76; 601 NW2d 887 (1999), it may constitute ineffective assistance of counsel if it denies a defendant a substantial defense, *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554

NW2d 899 (1996). A substantial defense is “one that might have made a difference in the outcome of the trial.” *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Although second-degree child abuse is a general intent crime, *People v Maynor*, 256 Mich App 238, 242; 662 NW2d 468 (2003), there is still an element of knowledge required to prove defendant acted recklessly.

A reckless act is defined in the context of second-degree vulnerable adult abuse as “Conduct that demonstrates a deliberate disregard for the likelihood that the natural tendency of the act or failure to act is to cause . . . serious physical harm.” *People v DeKorte*, 233 Mich App 564, 568; 593 NW2d 203 (1999), quoting MCL 750.145m(p). Deliberate disregard is defined as “a conscious decision to ignore the risk of harm.” *People v Hudson*, 241 Mich App 268, 280; 615 NW2d 784 (2000). In light of evidence presented by the prosecutor indicating defendant’s subjective knowledge, we cannot conclude that the expert testimony regarding defendant’s inability to perceive the situation would have altered the outcome of the trial. Therefore, no prejudice occurred. To the extent counsel erred by not presenting the expert testimony, the error was harmless and reversal is not required. *People v Mateo*, 453 Mich 203, 210, 212; 551 NW2d 891 (1996).

Review of an ineffective assistance of counsel claim is limited to the facts on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). There is no record regarding counsel’s reasons for not presenting the psychiatric results. It was defendant’s responsibility to create a testimonial record in the trial court to support her claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because defendant did not do so, and there is insufficient evidence to overcome the presumption that counsel’s failure to present the psychological evidence was sound trial strategy, *Rockey*, *supra* at 76, we conclude that defendant did not establish her claim of ineffective assistance of counsel.

Defendant next claims she was prejudiced by the trial court’s failure to sever the trials. We disagree.

A court’s determination whether to sever is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Severance is mandatory pursuant to MCR 6.121(C) where a defendant demonstrates severance is necessary to avoid prejudice to substantial rights. Co-counsel claimed his client’s rights would be prejudiced because defendant’s trial strategy was to implicate his client and the defense theories were antagonistic. However, antagonistic defenses must be mutually exclusive or irreconcilable before they are considered so prejudicial that they deny defendants a fair trial. *People v Hana*, 447 Mich 325, 348-349; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994), citing *United States v Arias-Villanueva*, 998 F2d 1491 (CA 9, 1993).

Because defendant maintained she did not see the boyfriend abuse her son, and the boyfriend testified that he did not remember anything about that night because he was intoxicated, their trial strategies were not mutually exclusive and the court did not abuse its discretion by denying severance. Defendant claims her substantial rights were prejudiced where evidence was presented that was admissible against her codefendant but not against her. However, after reviewing the evidence, we are convinced that the testimony tended to exonerate defendant rather than prejudice her.

Defendant next claims the trial court erred by assessing additional points to various offense variables. Defendant was sentenced on June 4, 2002, to one year in jail, with credit for one day. Defendant should have completed her sentence on June 3, 2003. Because defendant has fully served the minimum sentence, no relief can be offered, and the issue is therefore moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ David H. Sawyer

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray